Aw Yong Wai Choo v Arief Trading Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22–753 OF 1982
JAMES FOONG J
20 DECEMBER 2000

Civil Procedure *— Costs — Taxation — Appeal against — Getting up fee — Consolidation of 36 suits just before commencement of viva voce evidence of first witness — Whether deputy registrar should confine getting up to only one suit or to all 36 suits — Multiplicity of costs*

The High Court at Ipoh initially handed down a decision against the first and second defendants. It was appealed upon by the second defendant but was dismissed by the then Supreme Court. The plaintiffs then filed their bill of cost to be taxed for the case heard in the first instance. The deputy registrar taxed the bill of cost at RM49,642 and later reviewed it to RM65,895. Dissatisfied with his decision, both the plaintiffs and the second defendant applied to review the taxation.

Held:

(1) When there is a consolidation of cases for the purpose of economizing time and effort, then correspondingly, the cost for getting up must be reduced and confined to only points of law and matters raised at the hearing of the consolidated cases. It should not be repeated to each of the consolidated cases otherwise there would be a multiplicity of awards for the same amount of work and effort spent. It would be unfair to punish a defeated party by awarding cost for getting up in each of the consolidated cases when matters were heard only at one hearing; no greater amount of work and effort were expanded on others (see p 531E–G).

(2) Plaintiffs have explained that the consolidation in this case was only effected at the last minute, just before the trial began. By then, all necessary preparation on researching the law had been completed for each case. The court finds this argument without justification. No greater effort was expanded on looking up the same point of law which was applicable to all the cases since the relief claimed by all plaintiffs were similar and arose out of the same transaction or series of transactions (see p 531H–I).

(3) The court agrees with the second defendant that there was, in the first place, no necessity for the plaintiffs to file so many suits. The 36 cases involve common facts and law with relief and rights claimed arising out of the same transaction or series of transactions. A single action to include all the plaintiffs would have been more appropriate and economical from the very beginning (see pp 531I–532A).

(4) Though the Rules of the High Court 1980 provides for either the plaintiffs or the defendants to apply for consolidation at any time before the trial, failure on the part of the defendants to do so until it was initiated by the judge just before trial began should not be converted as a punishment to the second defendants to pay out cost for the looking up the law for each case, otherwise the plaintiffs could unjustly benefit from the situation to secure more cost than necessary without putting in any extra effort (see p 532A–B).

[**Bahasa Malaysia summary**

Mahkamah Tinggi di Ipoh pada mulanya telah memberikan keputusan terhadap defendan-defendan pertama dan kedua. Keputusan ini telah dirayu oleh defendan kedua tetapi telah ditolak oleh Mahkamah Agung pada ketika itu. Plaintif-plaintif kemudian telah memfailkan bil kos untuk dicukai mereka bagi kes yang didengar pada mulanya. Timbalan pendaftar telah mengenakan cukai bil kos tersebut pada RM49,642 dan kemudian mengkaji semulanya pada RM65,895. Disebabkan tidak puas hati dengan keputusan beliau, kedua-dua plaintif-plaintif dan defendan kedua telah memohon untuk dikaji semula pencukaian tersebut.

Diputuskan:

(1) Apabila terdapat gabungan kes-kes bagi tujuan penjimatan masa dan tenaga, maka begitu juga, kos permulaan mestilah dikurangkan dan terbatas kepada perkara-perkara perundangan ssahaja yang ditimbulkan dalam perbicaraan gabungan kes-kes tersebut. Ia tidak patut diulangkan kepada setiap gabungan kes-kes tersebut jika tidak akan berlaku penggandaan award-award bagi jumlah kerja dan usaha yang sama. Adalah tidak adil untuk menghukum satu pihak yang gagal dengan mengawardkan kos permulaan dalam setiap gabungan kes-kes tersebut apabila perkara-perkara didengar hanya dalam satu perbicaraan; tiada kerja dan usaha lebih yang ditambah ke atas yang lain (lihat ms 531E–G).

(2) Plaintif-plaintif telah menerangkan bahawa gabungan di dalam kes ini hanya berkuat kuasa di saat terakhir, sebaik sebelum perbicaraan dimulakan. Menjelang itu, semua persedian yang perlu dalam rujukan undang-undang telahpun selesai untuk setiap kes. Mahkamah mendapati hujahan ini adalah tanpa justifikasi. Tiada usaha yang lebih telah digunakan merujuk perkara undang-undang yang sama yang terpakai kepada semua kes-kes memandangkan relief yang dituntut oleh semua plainitf-plaintif adalah sama dan timbul daripada transaksi yang sama atau transaksi yang berturut-turut. Satu tindakan untuk memasukkan semua plaintif-plaintif adalah lebih sesuai dan jimat dari mula lagi (lihat ms 531H–I).

(3) Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan untuk sama ada plaintif-plaintif atau defendan-defendan untuk memohon penggabungan pada bila-bila masa sebelum perbicaraan, kegagalan di pihak defendan-defendan berbuat demikian sehingga ia diterima oleh hakim sebaik sebelum perbicaraan bermula tidak sepatutnya ditukarkan sebagai satu hukuman ke atas defendan kedua untuk membayar kos kerana membuat rujukan undang-undang bagi setiap kes, jika tidak plaintif-plaintif boleh secara tidak adil mendapat faedah daripada keadaan tersebut untuk memperoleh kos yang lebih daripada sepatutnya tanpa apa-apa usaha yang lebih (lihat ms 531I–532A).

(4) Walaupun Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan untuk sama ada plaintif-plaintif atau defendan-defendan untuk memohon penggabungan pada bila-bila masa sebelum perbicaraan, kegagalan di pihak defendan-defendan berbuat demikian sehingga ia diterima oleh hakim sebaik sebelum perbicaraan bermula tidak sepatutnya ditukarkan sebagai satu hukuman ke atsa defendan kedua untuk membayar kos kerana membuat rujukan undang-undang bagi setiap kes, jika tidak plaintif-plaintif boleh secara tidak adil mendapat faedah daripada keadaan tersebut untuk memperoleh kos yang lebih daripada sepatutnya tanpa apa-apa usaha yang lebih (lihat ms 532A–B)]

Notes

For cases on taxation of costs, see 2(1) Mallal's Digest (4th Ed, 1998 Reissue) paras 1405–1455.

Cases referred to

Harbin v Masterman (1896) Ch D 351 (refd)
Mucklow v Whitehead, & Openshaw v The Same (1854) Ex 97 (refd)
United Malayan Banking Corporation Berhad v Indah Sejati Sdn Bhd [1992] 1 AMR 77 (refd)

Legislation referred to

Housing Developers (Control & Licensing) Rules
Rules of the High Court 1980 O 59, part X of s 1(2) of Appendix I

Yau Wai Leong (*Chan Kok Keong & Associates*) for the plaintiff.
Devadason (*Maxwell Kenion Cowdy & Jones*) for the second defendant.

James Foong J. :

Introduction

On 21 September 1991, the High Court at Ipoh handed down a decision in favour of the plaintiffs against the first and second defendants. It was

appealed upon by the second defendant, but was dismissed by the then Supreme Court. Upon this, the plaintiffs filed their bill of costs to be taxed for the case heard in the first instance (the cost for the appeal having been settled at RM15,000 against the second defendant). Initially, the deputy registrar taxed the bill of costs at RM49,642. On a review made subsequently, he increased it to RM65,895. Dissatisfied with this decision, both the plaintiffs and the second defendant applied to me by way of encl 53 (plaintiffs' application) and 55 (second defendant's application) respectively to review the taxation of the deputy registrar.

Issue

Not unlike most cases seeking review on the amount of taxed costs the item in dispute centres on the sum awarded for getting up. In the plaintiffs' bill of cost, it is listed as RM170,000. But this was initially taxed down to RM30,000. On review, the deputy registrar increased this item to RM50,000. Despite this, both parties are of the view that this latter figure is not reasonable and justified; the plaintiffs are asserting that it is too low, and the second defendant, too high.

The plaintiffs' argument

Mr Yau, counsel for the plaintiffs, at the outset impressed upon me that the bill of costs in question involves 36 suits which were only consolidated just before the commencement of *viva voce* evidence from the first witness. The case, he explains, involved the plaintiffs as purchasers of houses under respective sale and purchase agreements entered by them individually with the first defendant. When the first defendant failed to complete the houses, the second defendant, who was the registered owner of the land where the houses were suppose to be erected, completed the project but charged the plaintiffs a higher purchase price, claiming that more superior quality materials than those specified in the sale and purchase agreements were used. This was resisted by the plaintiffs and when all negotiations for a settlement failed, the plaintiffs instituted 36 separate actions, all claiming, inter alia, for specific performance of their respective contracts. The second defendant denied liability and advanced the following defences: the second defendant was not a party to the sale and purchase agreements: the sale and purchase agreements were unenforceable for failing to comply with certain provision of the Housing Developers (Control & Licensing) Rules; and the second defendant completed the houses out of a social and moral duty and at the request of the plaintiffs. All these were rejected by the trial judge, Justice Peh (as he then was), who gave judgment for the plaintiffs with costs.

Upon these facts, Mr Yau argues that the deputy registrar should not confine the plaintiffs' claim for getting up to only one suit, but to all the 36 cases. And allotting a sum of RM5,000 for getting up fees to each case, the total amount would be RM180,000. Thus the figure of RM170,000 inserted in the plaintiffs' bill of costs for getting up is not substantial. To support this proposition he cited the established case of *Mucklow v Whitehead, & Openshaw v The Same* (1854) Ex 97 where facts were these:

Two plaintiffs, Mucklow and Openshaw, suffered distinct injuries caused by the bursting of a boiler belonging to the same owner and brought separate actions to recover damages against the same defendant. Both the plaintiffs employed the same attorney and their claims were to a certain extent similar. When they submitted their bills of costs to be taxed upon being successful with their claims, the taxing master refused to tax each bill separately. On review to the Court of Exchequer, Pollock CB declared:

> In these cases, rules *nisi* were obtained to review the taxation of the master, which had been made on the principle that there had been the same attention and care expended or labour bestowed in preparing the briefs, the same attorney being concerned for the plaintiffs in both cases. We certainly are very desirous, if it were possible, to make any arrangement that would be productive of economy in the administration of justice; but upon considering the case with the greatest attention, we find it impossible to lay down any rule that shall lead to that, without creating more litigation and more expense in discussing the application of it than, probably, money would be saved by the adoption of any such rule; and we are of the opinion that where the business is actually done, the master ought not to take into consideration that the same attorney was employed by two parties, *unless there is a consolidation. If there is a consolidation, that may make all the difference*; but, if the business is really done, although there are two causes, and the same attorney be employed by both parties, we think that there is no ground for reducing the ordinary and fair charge which an attorney may make against his client in each case. (Emphasis added.)

Though there was a consolidation of these 36 cases, Mr Yau stresses that the consolidation was made at a very late stage when all preparatory work, including getting up for each case, had been completed. Surely for this, the plaintiffs are entitled to be considered individually for their suits.

Second defendant's argument

Mr Devadason, counsel for the second defendant, disagreed with the views advanced by Mr Yau. He reminded this court of the consolidation, which he claims, effectively reduced all 36 cases into one. When this occurred, getting up must be confined to only one case, otherwise there will be a multiplicity of costs. He is of the view that though disbursement must be paid for each case, getting up must be restricted to only one. He then proceeded to add that the plaintiffs should, in the first place, not have filed so many suits. They could have combined their claims into one action since the defendants are the same and the causes of action arose out of similar circumstances. By pursuing their claims separately, the plaintiffs had incurred unnecessary costs and in accordance to the principle as laid down in the case of *Harbin v Masterman* (1896) Ch D 351, only one set of costs was awarded against the appellant where several respondents with the same interest engaged separate solicitors to defend them in an administrative action.

On the second defendant's own request to review the deputy registrar decision of increasing the getting up from RM30,000 to RM50,000, Mr Devadason points out that such sum handed down does not justify what

was argued at trial, where no new and novel points of law were advanced and no fresh propositions of law expounded.

Analysis

Justice Peh's decision is reported in the Malayan Law Journal under the citation: [1992] 1 MLJ 166. At the commencement of his judgment, the following are recorded:

> Before evidence *viva voce* commenced, the court discussed with all counsel and with their commendable co-operation made a consent order, inter alia, (a) that all the 36 cases be consolidated forthwith; (b) that one only of the 36 plaintiffs need give evidence for the time being as the evidence for all other plaintiffs, who would have given similar evidence; and (c) that any other witness may, if necessary, be called, examined and cross-examined. The consent order was of course to save valuable time. The object is believed to have been achieved.

Evidently, the learned judge was attempting to save time, cost and effort. This is very much in line with the objective of consolidation as laid down in *Halsbury's Laws of England* (4th Ed) Vol 37, where at p 60 it states:

> The main purpose of consolidation is therefore to save cost, time and effort, and to make the conduct of several actions more convenient by treating them as one action.

When there is a consolidation of cases for the purpose of economizing time and effort, then correspondingly the cost for getting up must be reduced and confined to only points of law and matters raised at the hearing of the consolidated cases. It should not be repeated to each of the consolidated cases, otherwise there would be a multiplicity of awards for the same amount of work and effort spent. This, I believe, is the rational of Pollock CB in *Mucklow v Whitehead, & Openshaw v The Same* where a distinct exception to awarding separate costs for two actions where the subject matter litigated was substantially similar where there 'is a consolidation'. When such an event (consolidation) has occurred, the work involved in looking up and researching on the law must be confined only to matters raised at the hearing of the case. It would be unfair to punish a defeated party by awarding costs for getting up in each of the consolidated cases when matters were heard only at one hearing; no greater amount of work and effort were expanded on others.

Admitting that though this may be logical, Mr Yau has explained that the consolidation in this case was only effected at the last minute, just before the trial began. By then, all necessary preparations on researching the law had been completed for each case. I find this argument is without justification. Firstly, as illustrated above, no greater effort was expanded on looking up the same points of law which were applicable to all the cases since the relief claimed by all plaintiffs were similar and arose out of the same transaction or series of transactions. Secondly, I agree with Mr Devadason that there was, in the first place, no necessity for the plaintiffs to file so many suits. The 36 cases involved common facts and law,

with reliefs and rights claimed arising out of the same transaction or series of transactions. A single action to include all the plaintiffs would have been more appropriate and economical from the very beginning. Though the Rules of High Court 1980 ('the RHC') provides for either the plaintiffs or the defendants to apply for consolidation at any time before the trial, failure on the part of the defendants to do so until it was initiated by the judge just before trial began should not be converted as a punishment to the second defendants to pay out costs for the looking up the law for each case, otherwise the plaintiffs could unjustly benefit from the situation to secure more costs than necessary without putting in any extra effort.

As for the second defendant's request to review the deputy registrar's decision for awarding the sum of RM50,000 for getting up as being too excessive, I find no merits in the grounds so advanced. The learned deputy registrar had taken into consideration all factors as set out under part X of s 1(2) of Appendix I under O 59 of the RHC in arriving at this figure with emphasis on the particular the value of the entire subject matter — approximately RM2.2m. This is very much in line with what was elaborated in *United Malayan Banking Corporation Berhad v Indah Sejati Sdn Bhd* [1992] 1 AMR 77 where 'due consideration must be given to this amount of the subject matter when determining the getting up cost.'

Conclusion

By reasons aforesaid, I hereby confirm the deputy registrar's certificate of costs and make no amendments thereto. There shall be no costs to either party in these two applications before me.

Order accordingly.

Reported by Wong Ee Lynn